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JUL 27 1953
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 206

FRANK F. REYNOLDS,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

FRANK F. REYNOLDS,
Petitioner, pro se.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner Frank F. Reynolds, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on May 5, 1953.

Opinion Below

The opinion in the above-entitled case is, as of the date of this Petition, unpublished in bound volume of Court of Claims reports. It is contained in the record of the case certified by the United States Court of Claims (R. 111-116).

Jurisdiction

The judgment of the United States Court of Claims was

entered on May 5, 1953 (R. 111). The jurisdiction of this Honorable Court is invoked under 28 U. S. C. sec. 1255(1).

Question Presented

Is a retired Reserve officer of any of the Armed Services "who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918" and who otherwise qualified for non-disability retirement under the applicable general retirement law on the subject, entitled to retired pay at the rate of "75 per centum of his active duty pay at the time of his retirement" as provided in par. 4, Sec. 15 of the Pay Readjustment Act of 1942 and re-enacted by exception from repeal in the Career Compensation Act of 1949?

Statute Involved

> "The retired pay of any officer of any of the services mentioned in the title of this Act [Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service] who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement." [Bracket inserted.] (P. L. 607, 77th Congress, June 16, 1942; ch. 413, 56 Stat. 359, 368; 37 U. S. C. A. sec. 115.)

Statement

Having completed all the general requirements for non-disability retirement under Public Law 810, 80th Congress (R. 24-25), the Petitioner was placed on the Naval Reserve Retired List as of November 1, 1950 (R. 16) and paid retired pay at the rate of $157.03 per month or 32.41% of his active duty pay ($484.50) at the time of his retirement (R. 12).

The Petitioner received retired pay at the aforesaid rate from November 1, 1950 until March 6, 1951, on which latter date he returned to temporary Government employment in a civilian capacity (R. 12). His retired pay was suspended during such employment.

The Petitioner's retired pay was calculated by the 2½% per year of accredited service formula contained in the aforesaid Public Law 810 (the 1948 Act).

But, in addition to satisfying the general requirements for retirement as to age and service, the Petitioner was also a Lieutenant Commander, U. S. Navy, Fleet Reserve, prior to November 12, 1918 (R. 12), and as such is entitled to 75% retired pay, not 32.41%, in accordance with the provisions of par. 4, Sec. 15 of the Pay Readjustment Act of 1942. (R. 24.)

The Petitioner made claim on the Navy Department for an adjustment in retired pay from 32.41% to 75% for the period November 1, 1950 to March 6, 1951 amounting to $859.79, more or less, and for 75% retired pay when his temporary Government employment ended and he resumed his status on the Naval Reserve Retired List for pay purposes. (R. 11-13.) This claim was denied. (R. 17-19.)

Having thus exhausted his administrative remedies, the Petitioner thereupon addressed a petition to the United States Court of Claims (R. 1-5) praying that his rights be adjudicated according to the plain terms of the aforesaid par. 4, Sec. 15 of the Pay Readjustment Act of 1942.

On May 5, 1953, the United States Court of Claims denied the Petitioner's claim and dismissed his motion for summary judgment (R. 116.)

Specification of Errors to Be Urged

The United States Court of Claims erred:

(1) In the "premise that as originally enacted in 1942,

section 115 applied only to Regular Naval officers." (R. 113-114.)

(2) In concluding that the re-enactment of par. 4, Sec. 15 of the Pay Readjustment Act of 1942 by specific exception from repeal in the Career Compensation Act of 1949 did not show the intent of the Congress that the said paragraph applied also to Reserve officers. (R. 115-116.)

(3) By not applying the principles of Administrative Law and decisions of the United States Supreme Court to the second proposition in the Berry case. (R. 87-98.)

(4) In relying on its own erroneous decision on the second proposition in the Berry case as controlling, which proposition presented practically the same question as does the Petitioner's case. (R. 116.)

(5) If the subject provision *is ambiguous,* by not applying the principles of Statutory Construction and the decisions of the United States Supreme Court to determine its legal import.

(6) If the subject provision *is not ambiguous,* by not applying it according to the plain meaning of its words and the decisions of the United States Supreme Court.

Reasons for Granting the Writ

(1) There are approximately 7,500 Reserve officers with World War I service, retired or to be retired, who are affected by the question presented for adjudication.

(2) The correct application of the Federal law involved is the direct and immediate legal responsibility of all branches of the Armed Services in the administration of the Reserve components.

(3) The United States Court of Claims misconstrued a decision of the United States Supreme Court (*United States* v. *Le Bris,* 121 U. S. 278, 280.)

(4) The United States Court of Claims did not follow the

decisions of the United States Supreme Court on the doctrine of *in pari materia.*

Argument

Preamble: This Argument submits for the Court's consideration two general propositions bearing on the solution of the question presented for adjudication:

> (a) That, by the doctrines of *legislative notice* and *in pari materia,* par. 4, Sec. 15 of the Pay Readjustment Act of 1942 becomes applicable to Reserve officers with World War I service when laws under which they can qualify generally for non-disability retirement are enacted.
>
> (b) That its re-enactment by exception from repeal in the Career Compensation Act of 1949 re-affirmed the Congressional policy that there be no discrimination in retired pay between Regular and Reserve officers with World War I service.

1. *Premise:* The Court of Claims' "premise that as originally enacted in 1942, section 115 applied only to Regular Naval officers" (R. 113-114) takes on the characteristics of an excluding presumption which is not supported to that extent by the incomplete legislative record. Par. 4, Sec. 15 of the Pay Readjustment Act of 1942 had its genesis in the proposed Hopwood amendment. (R. 30.) The stated purpose of this amendment was to equalize the retirement pay received by Regular Navy, Marine Corps and Coast Guard officers with World War I service who retired under the 1938 Act (2½ per year of service) and Regular Army officers with World War I service who retired under the 1940 Act (75% regardless of years of service). (R. 29.) But, when this Hopwood amendment modified to the Maas amendment (R. 32) came out of conference, it appeared in its present form as par. 4, Sec. 15, clearly worded and without any specific limitations as to its exclusive applicability

to Regular officers. (R. 33.) No record has been found, and probably none exists, showing why the conferees enlarged this provision to include the Army, the Coast and Geodetic Survey, and the Public Health Service, the other three Services mentioned in the title of the 1942 Act. The Regular Army officers already received 75% retired pay for World War I service and did not need the *same* benefit conferred on them *again* by the 1942 Act. The other two Services do not appear to have actively participated in supporting its enactment. So, no *positive* deduction as to the Congressional intent *in 1942* can be made from the legislative record of that time. (R. 34-35.) It is more precise to say that when originally enacted in 1942 the Regular officers were the only ones to whom the subject provision could be applied because at that time there were no general non-disability retirement laws for Reserves. But, it does not necessarily follow that it could not be applied to qualified Reserve officers at a later date when non-disability retirement laws including them were enacted because

> "The fact that in enacting a statute Congress could not have had a particular field for its application in mind is not enough to exclude its therefrom, but it is necessary to go further and say that had the situation been foreseen Congress would have so varied its comprehensive language to exclude it from the operation of the act." (50 Am. Jur. pag 225 citing Puerto Rico *v.* Shell Co. (PR) 302 U. S. 253, 257.)
>
> "8. Statutes. -:— 234½—General legislative enactments prospective in operation apply to all persons and subjects within their general purview, including those which come into existence subsequently."
>
> "Legislative enactments in general and comprehensive terms prospective in operation apply alike to all persons, subjects, and business within their general purview, including those that come into existence subsequent to their passage." [*Syllabus.* Feitler et al. *v.* United States (CAA 3d) 34 F (2d) 30 (affirmed in Danovitz *v.* United States, 281 U. S. 389.)]

And, one of the fundamental rules of statutory construction is "that where the general language of a statute is broad enough to include a particular subject matter, an intent to exclude it from the operation of the law must be definitely expressed." (*Choteau* v. *Burnet*, 283 U. S. 691, 696.) (R. 55-56.)

2. *Extension of Premise:* (a) In addition to the uncertainty of its initial premise, the Court erred in extending it to the conclusion that—

> "Since the language of Sec. 115 remained unchanged, although excepted from repeal in the Career Compensation Act, we cannot find in the statute, as finally enacted October 12, 1949, a clear intention on the part of Congress to have Reserve officers included within the terms of Sec. 115, supra." (R. 114.)

(b) The Career Compensation Act of 1949 originated with the Hook Commission Report and passed through three drafts and redrafts of Bills (H. R. 2553, 4591, and 5007) before enactment. (R. 35-39.) The Report and the first draft (H. R. 2553) repealed the entire Pay Readjustment Act of 1942. But in the second and third drafts (H. R. 4591 and 5007) the House Armed Services Committee deliberately excepted par. 4, Sec. 15 of the 1942 Act from repeal. No legislative history has been found on the Congressional intent of excepting the subject provision from repeal in Sec. 531 (b) (34) of the 1949 Act.

(c) The Court of Claims, quoting an extract from House Report No. 583 and a statement by Mr. Vinson, Chairman of the House Armed Services Committee (R. 115), erroneously concludes that—

> "These remarks, however, were directed at the new benefits given reservists under the disability retirement provisions of the bills. They could have no bearing on other retirement benefits since these bills, as pointed out above, contemplated no change in the existing nondisability retirement laws. (R. 116.)

(d) The Career Compensation Act of 1949 is divided into five titles. Title II sets forth new rates of pay. Title IV contains comprehensive provisions relating to *disability* retirements. Title V—"Miscellaneous Provisions"—includes many sections relating to *non-disability* retirements: i.e.: Sections 511, 512, 513, 514, 516, 517, 519, 520, 521, 522, and 531 (b) (34). Hence, it is incorrect to say that the Career Compensation Act of 1949 "contemplated no change in the existing non-disability retirement laws."

(e) Since it is beyond dispute that the Congress did consider certain aspects of *non-disability* retirement, although it did not go into the subject in Title V to the same extent that it revised the disability retirement laws in Title IV, it is in order to examine the action of the Congress with respect to non-disability retirement bearing particularly on the question presented for adjudication.

(f) As early as 1938 the Congress authorized exactly the same non-disability retirement for Navy lieutenants, both Regulars and Reserves, with World War I service. (R. 34.) In 1940 the Congress recognized the inseparability of Regulars and Reserves in the over-all program of National Defense and worded a section of the Criminal Code accordingly (R. 35). In 1946 it passed Public Law 305 retiring a designated class of Naval and Marine Corps officers, both Regulars and Reserves, granting them identically the same non-disability retirement benefits. (R. 27, 60). In 1948 it enacted Public Law 810 under which both Regulars and Reserves can qualify generally for non-disability retirement. (R. 24-25, 100-102). In 1949 it passed the Career Compensation Act, Sec. 402 (i) in Title IV reading as follows:

> "All members of the reserve components heretofore or hereafter retired or granted retirement pay because of physical disability shall be entitled to the same pay, rights, benefits, and privileges provided by law or regulation for retired members of the regular services."

This Sec. 402 (i) shows conclusively the intent of the Congress to eliminate any discrimination between Regulars and Reserves who are retired for *physical disability.* It remained, then, to eliminate any discrimination between Regulars and Reserves who retire on a *non-disability* status. This the Congress did, insofar as the 75% retired pay for World War I service is concerned, by re-enacting par. 4, Sec. 15 of the 1942 Act by exception from repeal in Sec. 531 (b) (34) of the 1949 Act. The attention of this Honorable Court is respectfully invited to the fact that in 1949 the World War I was 31 years past and all Regular officers with continuous service since World War I had had ample opportunity to qualify generally for non-disability retirement and receive 75% retired pay either under par. 4, Sec. 15 of the 1942 Act or by the 2½% per year formula for 30 years' service. Their rights under par. 4, Sec. 15 of the 1942 Act were saved by Sec. 519 and Sec. 520 of the 1949 Act, and the Congress could have repealed the entire 1942 Act without affecting them. But the Congress re-enacted this paragraph of the 1942 Act by excepting it from repeal. The Congress can not be charged with passing legislation to no purpose. This exception from repeal was certainly intended to benefit somebody, obviously those officers with World War I service who had not yet in 1949 qualified generally for non-disability retirement. *And they can only be Reserve officers.*

(g) In *United States* v. *Le Bris* (121 U. S. 278, 280), it was held that—

> "The re-enacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested." (R. 116).

This general rule was stated in 1887 and concerned the definition of "Indian country" *at that time.* But, twenty-five years later, in 1912, this Court recognized that the

original significance of words used in a statute may change with the years and said:

> "But, as has frequently been stated by this court, the definition may still 'be referred to in connection with the provisions of its original context which remains in force, and may be considered in connection with *the changes which have taken place* in our situation, with a view of determining *from time to time* what must be regarded as Indian country where it is spoken of in the statutes.'" (Clairmont *v.* United States, 225 U. S. 551, 557; Donnelly *v.* United States, 228 U. S. 243, 269.) (Emphasis supplied.)

And so it is with par. 4, Sec. 15 of the 1942 Act. The definition of "any officer" in 1942 could only embrace Regular officers because at that time there were no general non-disability retirement laws for Reserves. But in 1946 and 1948 changes took place in the retirement situation by the enactment of laws providing for the non-disability retirement of Reserves. It is respectfully submitted that by these changes it is "plainly manifested" that the definition of the words "any officer", like the definition of "Indian country", was enlarged in scope by the doctrine of legislative notice to include Reserve officers.

(h) As recently as last year, the Congress passed "The Armed Forces Reserve Act of 1952" reiterating its attitude of equality between Regulars and Reserves in the following sections:

> "Sec. 101. When used in this Act—
> (e) 'Armed Forces of the United States' means the Army, Air Force, Navy, Marine Corps, and Coast Guard, including all components thereof."
> "Sec. 250. There shall be no discrimination between and among members of the Regular and reserve components in the administration of laws applicable to both Regulars and Reserves." (R. 27.)

3. *Berry Case:* Berry is a retired officer of the United States Naval Reserve. The second proposition in the Berry case (R. 87-98) made claim—

> "(2) For the difference in the retired pay received by him since his retirement on February 1, 1947, to date of judgment and that to which entitled if his retired pay is computed on the basis of 75 percent of the active duty pay received by him immediately prior to his retirement."

basing said claim on par. 4, Sec. 15 of the Pay Readjustment Act of 1942. But, Berry did not file a bona-fide claim initially with the Navy Department (R. 97), much less exhaust his administrative remedies, as required by the principles of Administrative Law and the Navy Regulations. (R. 91-94.) This Honorable Court has repeatedly held that one must exhaust his administrative remedies before seeking judicial relief. (R. 95-96.) (*Macaulay* v. *Waterman S. S. Corp.*, 327 U.S. 540, 543; *Aircraft & Diesel Equipment Corp.* v. *Hirsh*, 331 U. S. 752, 767). It is respectfully submitted that the United States Court of Claims lacked jurisdiction as to the second proposition in the *Berry case* and erred in not dismissing that part of his petition relating thereto.

4. *Citation of Berry Case:* Since the United States Court of Claims lacked jurisdiction as to the second proposition in the Berry case, its judgment thereon is not binding. The Court therefore erred in citing its decision in that case as controlling in the case of the Petitioner on the same point of law.

5. *Ambiguous:* (a) If par. 4, Sec. 15 of the Pay Readjustment Act of 1942 *is ambiguous,* then that ambiguity must be resolved by the rules of statutory construction. (R. 51-64.)

(b) The legal import of the subject paragraph can not

be determined by reference to the rest of the 1942 Act. It was a separate piece of legislation when introduced as a floor amendment in 1942, having neither connection nor continuity with any other part of the Act, which was merely a convenient vehicle of enactment; and it continues to stand alone as a law complete in itself, complementary to the general retirement laws. (R. 57, 59-60.)

(c) No legislative record has been found explaining why the conferees changed the proposed Hopwood-Maas amendment of limited application to the broad all-inclusive wording of the provision as enacted. In 1942 there were no general laws under which Reserves could retire on nondisability. But in 1946 the Congress enacted Public Law 305 with the presumption of legislative notice of the 75% retired pay provision in the 1942 Act. (R. 27-28, 57, 60.) In 1948 the Congress passed Public Law 810, also with the presumption of legislative notice of the 75% retired pay provision in the 1942 Act. And, in 1949 the Congress enacted the Career Compensation Act taking *positive* legislative notice of the 75% retired pay provision in the 1942 Act by excepting it from repeal *at a time when it could only apply to Reserve officers.* The same House Report No. 583 from which the Court of Claims obtained its extract (R. 115) also stated—

> "Furthermore, it should be remembered that the Congress has within the past 3 years carefully considered all of the voluntary and involuntary retirement laws, as indicated by Public Law 305 of the Seventy-ninth Congress and Public Laws 381 and 810 of the Eightieth Congress." (R. 38, 56.)

And Mr. Van Zandt said—

> "Special benefits as between Regular, National Guard man, or Reserve no longer exist. *From the cover sheet to the last page* this is a nondiscriminatory piece of legislation. It may fairly be said that with the enact-

> ment of this bill the Congress will have, for the first time, provided *complete* equality of treatment for members of all of the components." (R. 38.) (Emphasis supplied.)

It is particularly significant that Mr. Van Zandt referred to the entire 1949 Act, "from the cover sheet to the last page", "complete equality of treatment", not just Title IV on disability retirements as decided by the Court of Claims.

(d) This Honorable Court's attention is respectfully invited to Sec. 512 of the 1949 Act on non-disability retirement which, in pertinent part, reads:

> "Sec. 512. On and after the effective date of this section, any person who heretofore has been granted retired pay or who hereafter is granted retired pay pursuant to title III of the Act of June 29, 1948 (ch. 708, 62 Stat. 1087), shall have his retired pay computed as authorized by the aforesaid title III on the basis of the pay provided for in this Act; . . ."

As previously stated, the 1949 Act originated with the Hook Commission Report and passed through three drafts and redrafts of Bills: H.R. 2553, 4591, and 5007. This Sec. 512 is not in either the Hook Commission Report or H. R. 2553. It first appears as Sec. 513 in H. R. 4591, and in this same Bill the exception from repeal of par. 4, Sec. 15 of the 1942 Act also shows up for the first time as Sec. 533 (b) (34). House Report No. 583 of May 16, 1949, to accompany H. R. 4591 says:

> "Sec. 513 extends the *pay provisions* of this proposed bill to members and former members of the Reserve components heretofore or hereafter granted retired pay pursuant to title III of Public Law 810, Eightieth Congress. . . ." (page 39.) (Emphasis supplied.)

One of "the pay provisions of this proposed bill" is the

75% retired pay for World War I service provision contained in the exception from repeal of par. 4, Sec. 15 of the 1942 Act. [Sec. 533 (b) (34) of the draft of H. R. 4591.] In H. R. 5007 the section numbers are changed and accord with those in the 1949 Act. House Report No. 779 of June 10, 1949, to accompany H. R. 5007, says:

> "The new pay scales shall apply likewise in the computation of retired pay of Reserve personnel who qualify for retirement under the Reserve Retirement Act (Public Law 810, 80th Cong.)." (page 8.)
>
> "Sec. 512 specifically provides that the new pay scales shall apply to those heretofore or hereafter granted retired pay pursuant to the Reserve-Retirement Act of 1948." (page 24.)

These statements taken from House Reports No. 583 and No. 779 show that the Congress intended by Sec. 512

> (1) That Reserves benefit by the *pay provisions* in the 1949 Act, and
>
> (2) That Reserves benefit by the *pay rates* in Title II of the 1949 Act.

(e) The *primary authorization* in Public Law 810, or any other general retirement law for that matter, is the change from active duty to retired status. Retired pay is the perquisite resulting from the authorized retired status and is computed for each individual according to his qualifications (age, years of service, etc.). Under the more recent general retirement laws (i.e.: the 1938, 1940, 1946, 1948, and 1949 Acts), retired pay is calculated by multiplying the individual's base pay by 2½% per year of accredited service. But, in addition to general retirement laws applicable to everyone who can qualify under them, the Congress has, from time to time, passed special retirement laws granting additional retired pay to those whose qualifications are over and above the general qualifications for re-

tirement. (R. 65-66.) Par. 4, Sec. 15 of the Pay Readjustment Act of 1942, re-enacted by exception from repeal in Sec. 531 (b) (34) of the Career Compensation Act of 1949, is just such a special retirement law. The Comptroller General cogently remarks:

> "The sole purpose of the provision of the fourth paragraph of section 15 was to change the method of computation of retired pay of officers who had served prior to November 12, 1918, from that of 2½ per centum of their active duty pay multiplied by the number of years of service to that of 75 per centum of their active duty pay without regard to the number of years of service." (B-74361; 27 Comp. Gen. 781.) (R. 59-60.)

The principle applicable to Sec. 512 and Sec. 531 (b) (34) is condensed in 50 Am. Jur. sec. 363 in the following words:

> "Harmonizing Statutes and Parts of Statutes.—Consistency in statutes is of prime importance, and, in the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions. A construction of a statute which creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act and will carry out the intention of Congress. These rules are particularly applicable to statutes passed at or about the same time, *or at the same session of the legislature,* since it is not to be presumed that the same body of men would pass conflicting and incongruous acts." (Emphasis supplied.)

It is, therefore, submitted that this Sec. 512, noting

particularly the words "in this Act, coupled with the exception from repeal of the 75% retired pay for World War I service in Sec. 531 (b) (34), shows conclusively that Reserve officers with World War I service, who qualify generally for retirement under Public Law 810, are entitled to have their retired pay calculated at 75% of the base pay rates stated in Title II of the 1949 Act. (R. 61.)

(f) The pertinent parts of the four Acts, 1942, 1946, 1948, and 1949, on the subject of retired pay for Reserve officers are to be construed in *pari materia* in order to resolve the ambiguity, weld the subject into one harmonious whole, and determine the legal import of par. 4, Sec. 15 of the Pay Readjustment Act of 1942 and its re-enactment by exception from repeal by Sec. 531 (b) (34) of the Career Compensation Act of 1949. As Chief Justice Marshall said:

> "Without deciding this question as depending merely on the original law, it is to be observed that acts in pari materia are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law." (Charles Alexander *v.* Mayor and Commonalty of Alexandria, 9 U. S. 1, 7; United States *v.* Freeman, 44 U. S. 556, 564; Cope *v.* Cope, 137 U. S. 682, 688; Tiger *v.* Western Improvement Co., 221 U. S. 286, 309; Great Northern Ry. Co. *v.* United States, 315 U. S. 262, 277.) (R. 59-64.)

6. *Not Ambiguous:* (a) If par. 4, Sec. 15 of the Pay Readjustment Act of 1942 *is not ambiguous,* and the Court of

Claims so held in the *Carroll case* (R. 51), then the Court erred in deriving its legal import from the incomplete legislative history.

(b) "The legislative history of this provision, and the successive alterations of its wording in both Houses of Congress and in conference, to which we are referred, cannot affect its interpretation, since the language of the act as adopted is clear." (Kuehner *v.* Irving Trust Co., 299 U. S. 445, 449.)

(c) "The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity." (Fairport, Painesville & Eastern Railroad Co. *v.* Meredith, 292 U. S. 589, 594.)

(d) "Where the general language of a statute is broad enough to include a particular subject matter, an intent to exclude it from the operation of the law must be definitely expressed." (Choteau *v.* Burnet, 283 U. S. 691, 696.) (R. 51-56.)

Conclusion

For the foregoing reasons, the Petitioner prays that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1953

No. 206

FRANK F. REYNOLDS, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 111-116) is reported at 111 F. Supp. 881.

JURISDICTION

The order of the Court of Claims granting the Government's motion for summary judgment was entered on May 5, 1953 (R. 111, 116). The petition for a writ of certiorari was filed on July 27, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether an officer of the United States Naval Reserve who qualifies for retired pay under the provisions of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, 34 U.S.C., Supp. V, 440h-440q, is entitled to have his retired pay computed under the provisions of 37 U.S.C. 115.

STATUTES INVOLVED

The pertinent portions of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948 and 37 U.S.C. 115 are set forth in the Appendix, *infra,* pp. 16-19.

STATEMENT

Petitioner, an officer of the United States Naval Reserve who qualified for retired pay under the provisions of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, brought this suit to recover the difference between the retired pay computed under the provisions of that Act and the greater amount of retired pay to which he contends he is entitled under 37 U.S.C. 115.

On June 18, 1907, petitioner was appointed a Midshipman in the United States Navy, and on March 7, 1912, he was commissioned an Ensign

(R. 2). On July 7, 1915, he resigned a commission in the rank of Lieutenant (j.g.), to which he had been promoted in the interim (R. 2). On March 27, 1917, petitioner was commissioned a Lieutenant (j.g.) in the United States Navy, Fleet Reserve; he served continuously on active duty from April 25, 1917, to August 29, 1919, during which time he received promotions up to the rank of Lieutenant Commander (R. 2). On August 29, 1919, he was placed on inactive duty and thereafter he continued in that status until his enrollment in the Fleet Reserve expired on April 17, 1921 (R. 2). About three years later petitioner was commissioned a Lieutenant Commander in the United States Naval Reserve for a four year enrollment which expired on January 3, 1929 (R. 2). More than eleven years later, on August 9, 1940, petitioner was again commissioned a Lieutenant Commander in the United States Naval Reserve, which rank he held until November 1, 1950, actually serving on active duty during the period from August 23, 1940, to July 2, 1946 (R. 2-3).

Pursuant to his submission of qualifications for the benefits of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948 and to his request for transfer to the Naval Reserve Retired List, petitioner was transferred to that list and began to receive retired pay at the rate of $157.03 per month, effective November 1, 1950 (R. 3). This retired pay was computed under

the point system established by Sections 302 and 303 of Title III of that Act, 34 U.S.C. 440i and 440j, and amounted to 32.41 percent of the active duty base and longevity pay which he would have been receiving had he been serving on active duty as a Lieutenant Commander at the time he was granted such pay (R. 3). He continued to receive such retired pay until March 6, 1951, when he became temporarily employed as a civilian with the Government. During that period of approximately five months he received a total of $654.29. (R. 3-4.)

On March 27, 1952, petitioner filed a claim for $859.79 with the Secretary of the Navy. This was the difference between the amount of retired pay actually received by him during the five month period and the amount to which he contended he was entitled under 37 U.S.C. 115, if his retired pay were computed at 75 percent of the active duty base pay of a Lieutenant Commander. (R. 4.) Petitioner's claim was rejected by the Secretary of the Navy on April 21, 1952 (R. 4), and he then instituted this suit in the Court of Claims.

There being no issues of fact, both parties filed motions for summary judgment (R. 9, 69). On May 5, 1953, the court entered an order denying petitioner's motion for summary judgment and granting the Government's motion (R. 116). The court based its decision upon the conclusion that the provisions of 37 U.S.C. 115, upon which peti-

tioner relies, originally applied only to regular officers of the armed services, and that nothing in any subsequent legislation had made it applicable to reserve officers (R. 113-116). Accordingly, the Court of Claims found it unnecessary to consider the further question whether Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948 requires that retired pay be computed only in accordance with the provisions of that statute and no other (R. 116).

ARGUMENT

Although petitioner, as a reserve officer, became qualified for retired pay under the provisions of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, he claims more than twice the amount of pay allowable under that Act. The basis of his argument is that, by implication, the Pay Readjustment Act of 1942, 56 Stat. 359, was amended so as to apply to reserve officers who possessed the qualifications established by the 1948 Act. The fourth paragraph of Section 15 of the 1942 Act is now found in 37 U.S.C. 115, Appendix, *infra*, p. 19, and makes provision for retired pay equal to 75 percent of the active duty pay for certain officers who served in military or naval forces prior to November 12, 1918. The Court of Claims has demonstrated beyond cavil (*Berry* v. *United States*, 107 F. Supp. 849), and petitioner concedes (Pet. 10; see also Pet. 12) that 37 U.S.C. 115 as originally enacted had no application to reserve

officers. Petitioner contends, however, that the meaning which 37 U.S.C. 115 had in 1942 was changed by implication through the adoption of subsequent legislation, such as the Act of February 21, 1946, 60 Stat. 26, the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, 1087, and particularly the Career Compensation Act of 1949, 63 Stat. 802 (Pet, 10, 12-16).[1]

(1) Inasmuch as none of the legislation relied upon by petitioner specifically provides that 37 U.S.C. 115 shall be applicable to reserve officers, petitioner is forced to rely upon inferential arguments. But not one of these arguments has merit.

(a) The Act of February 21, 1946 (Pet. 12), was, as its preamble shows, directed primarily toward providing a means for compulsory retirement of high ranking regular officers in the Navy, Marine Corps, and Coast Guard. 60 Stat. 26.[2] Section 6 of the Act, 34 U.S.C. 410b, does make limited provision for the retirement of reserve officers of the Navy, Marine Corps, or Coast Guard who have

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[1] Petitioner also mentions the provisions in Section 250 of the Armed Forces Reserve Act of 1952, 66 Stat. 481, 495, that "There shall be no discrimination between and among members of the Regular and Reserve components in the administration of laws applicable to both Regulars and Reserves." The applicability of this section turns upon the very question here at issue, *i.e.*, whether 37 U.S.C. 115 applies "to both Regulars and Reserves."

[2] See the statements of Representative Vinson during the debates on the Act to the effect that it had no general application to reserves. 91 Cong. Rec. 12464; 92 Cong. Rec. 603.

completed over 20 years of active duty—a qualification which petitioner cannot satisfy. Significantly, Section 7, 34 U.S.C. 410c, establishes as the maximum pay allowable those reserves who can meet this much more stringent requirement the same 75 percent of active duty pay which petitioner claims under the less exacting requirements of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948.

(b) While rejecting the specific provisions for computation of retired pay in Title III of the Act of 1948 as inadequate, petitioner also argues that this Act constituted an implied amendment of the 1942 Act (Pet. 10, 12). However, both the specific provisions of Title III and its legislative history negative any such suggestion. On the contrary, as demonstrated *infra*, pp. 11-15, they show that any person whose qualifications for retired pay are based solely on Title III is entitled only to pay computed in accordance with the provisions of that Title.

(c) It is primarily on the Career Compensation Act of 1949 that petitioner relies to establish an amendment by implication of 37 U.S.C. 115 making it applicable to reserve officers.

The only specific reference in the Career Compensation Act to Section 15 of the Pay Readjustment Act of 1942, from which 37 U.S.C. 115 is derived, is contained in Section 531(b)(34) of that Act, 63 Stat. 839. Section 531(b) lists the acts and

parts of acts which are repealed, the thirty fourth act in the list of forty one [3] being:

> (34) The Act of June 16, 1942 (56 Stat. 359), as amended, except section 12 of such Act, as amended, except that part of paragraph 1 of section 10 of such Act, as amended, which relates to enlisted personnel in a travel status, and except paragraph 4 of section 15 of such Act, as amended.

This, then, is the language from which petitioner derives an implied amendment of 37 U.S.C. 115 to make it applicable to reserve officers. In effect, he contends (Pet. 12, 16) that the exemption from repeal constituted not only a reenactment, but a reenactment with a changed meaning.

However, as the Court of Claims demonstrated (R. 114-116), neither the legislative history of the Career Compensation Act of 1949 nor the ordinary canons of construction will support petitioner's contention that a changed meaning was thereby given 37 U.S.C. 115. The reports of both the House and the Senate committees on the bills which became the Career Compensation Act of 1949 make it clear that that Act did not attempt to modify or revise the existing retirement laws. House Rep. No. 583 on H.R. 4591, 81st Cong., 1st Sess., p. 4; Senate Rep. No. 733 on H.R. 5007, 81st Cong., 1st

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[3] Section 531(c) lists an additional twenty acts which are repealed in whole or in part.

Sess., p. 2. As indicated by those reports, the Career Compensation Act of 1949 had its origins in the recommendations of the Hook Commission, a committee appointed by the Secretary of Defense to study the problem of establishing a uniform, consistent, and cohesive plan governing the career compensation of persons in the uniformed services. The recommendations of the Hook Commission included changes in the field of non-disability retirement, but, as explained in House Report 583, *supra,* p. 4:

> While the committee has accepted many of the recommendations of the Hook Commission, it has not accepted them all, and, in some instances, fundamental changes were made in the initial legislative draft. Originally the proposed act contained revisions of voluntary and involuntary retirement laws. The committee was of the opinion that the subject of voluntary and involuntary retirement was so complex, so vast, and would have such far-reaching effects upon the services that an attempt to revise or rewrite these laws should be held in abeyance until some future date, when it could be made as a separate study. Furthermore, it should be remembered that the Congress has within the past 3 years carefully considered all of the voluntary and involuntary retirement laws, as indicated by Public Law 305 of the Seventy-ninth Congress

and Public Laws 381 and 810 of the Eightieth Congress.

Substantially the same explanation was given in both the House and the Senate discussions of the bills by members particularly charged with responsibility for the legislation.[4] Accordingly, it is clear that the exception from repeal of the fourth paragraph of Section 15 of the Pay Readjustment Act of 1942 was made, not to make that section applicable to reserves, but in accordance with the determination that no changes in the existing nondisability retirement systems would be made by the Career Compensation Act of 1949.[5]

Finally, it may be noted that, contrary to petitioner's contention, the usual canon of construction is that reenacted sections of a statute are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested. *United States* v. *LeBris,* 121 U.S. 278, 280; *Heald* v. *District of Columbia,* 254 U.S. 20, 23; *Posadas* v. *National City Bank,* 296 U.S.

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[4] See the statement of Representative Vinson at 95 Cong. Rec. 6578, quoted in the opinion of the Court of Claims at R. 115, and the statement of Senator Chapman at 95 Cong. Rec. 13196.

[5] Section 512 of the Act, on which petitioner places great reliance (Pet. 13-14), obviously does no more than make the new pay scales of the Act applicable to persons retired under Title III of the Army and Air Force Vitalization and Retirement Equalization Act. It in no way purports to change the method of computing the percentage of active duty pay to which a person meeting requirements of that Act is entitled.

497, 506.[6] Just as repeals by implication are not favored, amendment or modification by implication is not favored and should not be assumed unless clearly required. *United States* v. *Madigan,* 300 U.S. 500, 506; *Proutt's Estate* v. *Commissioner of Internal Revenue,* 125 F. 2d 591, 595 (C.A. 6). In particular would this caution seem applicable where the effect of the implied amendment would not only more than double the retired pay of petitioner and the thousands of reserve officers in comparable circumstances (see Pet. 4)—thus imposing a great financial burden on the public treasury—but, as we shall show, would also present an anomalous departure from a carefully devised statutory system by which both eligibility for and the amount of retired pay of reserves are closely integrated in furtherance of the objective of obtaining active participation of reserves in training programs.

2. Because the Court of Claims correctly found that 37 U.S.C. 115 did not apply to reserve officers, it found it unnecessary to determine whether one whose qualifications for retired pay rested solely on Title III of the Army and Air Force Vitaliza-

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[6] Petitioner's reliance on cases holding that statutes in *pari materia* should be construed so as to create a harmonious body of law is based on the misapprehension that the service of reserves, much or most of which may have been on inactive duty, should for all purposes be considered absolutely comparable with the service of regular officers, who usually devote many years to active service in the armed forces.

tion and Retirement Equalization Act of 1948 could receive retired pay computed, not as provided by that Act, but by the provisions of 37 U.S.C. 115. It seems clear, however, that one whose only qualifications for retired pay are derived from Title III of that Act may draw only the retired pay provided for by that Act, and that the result reached by the Court of Claims may equally well be sustained on this alternative ground. Indeed, any other result would be disruptive of the statutory system established by Title III and destructive of the objectives of Congress in adopting that system.

Section 302(a) of Title III, 34 U.S.C., Supp. V, 440i(a) (Appendix, *infra,* pp. 16-17), provides generally that any person who attains the age of sixty, having completed an aggregate of twenty or more years of satisfactory service in the reserve components of the Army, Air Force, or Navy, shall be entitled to retired pay. Section 302(b), 34 U.S.C., Supp. V, 440i(b) (Appendix, *infra,* pp. 17-18), establishes a system, based on points awarded for days of active duty, attendance at drills, and membership in reserve components, for determining what constitutes a year of satisfactory service after July 1, 1949. Section 303, 34 U.S.C., Supp. V, 440j (Appendix, *infra,* pp. 18-19), by its own terms appears to be an exclusive provision for computing the pay which "Any person granted retired pay pursuant to the pro-

visions of this title shall receive * * *.'"[7] Thus, an integrated system for determining both eligibility for and the amount of retired pay has been established by Title III. Certainly, the balance of this complete and carefully devised system should not be disturbed by the interjection of provisions from other statutes unless specifically required. Indeed, Section 305, 34 U.S.C., Supp. V, 440*l*, expressly provides that Title III "* * * shall not be applicable to any officer * * * who, prior to or subsequent to [June 29, 1948,] is entitled to receive, or is receiving under any other provision of law, retired pay for military or naval service * * * ."

That Congress intended to set up a retirement pay system for reserves entirely distinct from that previously applicable to the regular members of the armed forces also appears from the legislative history of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948. The reports of both the House and the Senate on the bill which became that Act refer to the provisions in Title III as establishing "a new policy" or "a new principle" governing the

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[7] That method allows retired pay at the rate of 2½ percent of the active duty pay which the officer would have been receiving if on active duty in the highest rank held by him multiplied by a number of years equal to the sum of his actual active duty service and an allowance of one day for each point earned by attendance at drills or membership in a reserve component. For each year of service prior to July 1, 1949, other than active duty service, an allowance of 50 days is made.

retirement of members of reserve components. H. Rep. No. 816, on H.R. 2744, 80th Cong., 1st Sess., p. 9; S. Rep. No. 1543, on H.R. 2744, 80th Cong., 2nd Sess., p. 9. Similar references to the "new policy" of providing non-disability retirement benefits for reserves were made during the Congressional debates on the bill. See *e.g.*, 93 Cong. Rec., 9579; 94 Cong. Rec. 2433, 2490. The reason for establishing this new policy was explained as "* * * to provide an inducement to members of Reserve components to remain active in the Reserves over a long period of time, thereby providing a better trained and more ready Reserve to meet the needs of our national-defense structure." Senate Rep. No. 1543, *supra,* p. 9; see also House Rep. No. 816, *supra,* p. 9. And similar explanations that the bill was designed to meet the defense needs of the nation were again given in Congressional debates. See, *e.g.,* 94 Cong. Rec. 2433, 2485, 2487, 2490. Thus, it appears that Congress was legislating to meet the future defense needs of the country and not to provide bonuses or gratuities for past services, except insofar as necessary to avoid discrimination against those who had rendered services in the past. Certainly, there was no intention to discriminate in favor of those like petitioner, whose claim for special treatment is based upon service in World War I, by allowing them more than twice the amount of retired pay which might be earned through equivalent service after the passage of the Act by a

veteran of World War II whose continued participation in Reserve affairs constituted the primary objective of the Act. Indeed, Congress specifically rejected a series of amendments designed to give the same benefit to veterans of the Spanish-American War and World War I as that given by the bill to World War II officers and enlisted personnel of retirement in the highest grade held during the war. 94 Cong. Rec. 2499-2502. Congress thereby indicated that it did not consider what might be called a bonus or reward for past services of a limited group of reserves as an objective of Title III, nor as supplementary to any of the objectives which led to the establishment of the first comprehensive non-disability retirement system for reserves.

CONCLUSION

The decision below is clearly correct, and, for the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1953

APPENDIX

Section 302, Title III, Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, 34 U.S.C., Supp. V, 440i, provides, in pertinent part:

> (a) Any person who, upon attaining or having attained the age of sixty years, has performed satisfactory Federal service as defined in this section in the status of a commissioned officer, warrant officer, flight officer, or enlisted person in the Army of the United States or the Air Force of the United States, including the respective reserve components thereof, and also including the federally recognized National Guard prior to 1933, the United States Navy including the reserve components thereof, the United States Marine Corps, including the reserve components thereof, or the United States Coast Guard, including the reserve components thereof, and has completed an aggregate of twenty or more years of such satisfactory service in any or all of the aforesaid services, shall, upon application therefor, be granted retired pay: *Provided,* That for the purposes of this section the last eight years of qualifying service for retirement under this title must have been service as a member of a reserve component except that any member of a reserve component of the Air Force of the United States shall be entitled to in-

clude service as a member of a reserve component of the Army of the United States performed on or prior to July 26, 1949: *Provided further,* That for the purposes of this subsection, simultaneous service as a member of a reserve component and as a member of the Regular Army, Navy, Air Force, or Marine Corps, shall not be deemed to be service in a reserve component: *Provided further,* That no person who was a member of a reserve component on or before August 15, 1945, shall be eligible for retirement benefits under this title unless he performed active Federal service during any portion of either of the two periods beginning April 6, 1917, and ending November 11, 1918, and beginning September 9, 1940, and ending December 31, 1946.

(b) Subsequent to the enactment of this Act [July 1, 1949], a year of satisfactory Federal service, for the purposes of this section only, shall consist of any year in which a person is credited with a minimum of fifty points, which points shall be credited on the following basis:

(1) One point for each day of active Federal service;

(2) One point for each drill or period of equivalent instruction, such drills and periods of equivalent instruction to be restricted to those prescribed and authorized by the Secretary of the respective service for the year

concerned, and to conform to the requirements prescribed by other provisions of law;

(3) Fifteen points for membership in a reserve component for each year of Federal service other than active Federal service.

(c) Each year of service as a member of a reserve component prior to the enactment of this Act [June 29, 1948], shall be deemed to be a year of satisfactory Federal service for the purposes of this section, subject to the provisions of subsection (e) of section 306 of this Act.

Section 303, Title III, Army and Air Force Vitalization and Retirement Equalization Act of 1948, as amended, 34 U.S.C., Supp. V, 440j, provides:

Any person granted retired pay pursuant to the provisions of this title shall receive such pay at an annual rate equal to 2½ per centum of the active duty annual base and longevity pay which he would receive if serving, at the time granted such pay, on active duty in the highest grade, temporary or permanent, satisfactorily held by him during his entire period of service, multiplied by a number equal to the number of years and any fraction thereof (on the basis of three hundred and sixty days per year) which shall consist of the sum of the following:

(i) All periods of active Federal service;

(ii) One day for each point credited pursuant to subparagraphs (2) and (3) of subsection (b) of section 302 of this Act, but no more than sixty days shall be credited on this basis in any one year for the purposes of this section:

Provided, That no person shall be entitled to receive such retired pay at an annual rate in excess of 75 per centum of said active duty pay: *Provided further,* That for each year of Federal service, other than active Federal service, performed as a member of a reserve component prior to the date of enactment of this Act [July 1, 1949] and credited in accordance with subsection (c) of section 302 of this title, such member shall be credited with fifty days for each of such years, for the purposes of this section.

Paragraph 4, Section 15 of the Pay Readjustment Act of 1942, as amended, 37 U.S.C. 115, provides:

The retired pay of any officer of the [Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, or Public Health Service] who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 206

FRANK F. REYNOLDS, *Petitioner*

vs.

THE UNITED STATES

REPLY BRIEF

Preamble: "There is no dispute as to the facts * * *" (R. 85, 111). The question presented (R. 21-22, Pet. 2) is strictly a legal one on the subject of 75% retired pay of Reserve officers with World War I service and, for its solution, requires the construction of the statute involved (R. 24, Pet. 2).

Amendment by Implication

1. The principle counter-Argument advanced by the Brief in Opposition rests on the erroneous premise that the Petitioner bases his entitlement to 75% retired pay under par. 4, Sec. 15 of the Pay Readjustment Act of 1942 on *amendment by implication* (Br. Op. 5, 6, 7, 8, 11). Nowhere in the entire record does the Petitioner mention this inferential rule of statutory construction. The

affirmative solution to the question presented (R. 21-22, Pet. 2) is placed squarely on the applicable, well-established doctrines of *legislative notice* and *in pari materia* (R. 59-64, Pet. 16).

2. To present a complete review of the subject, the Petitioner's contribution to the record discusses it in several aspects—i.e.: Legislative History (R. 28-39, Pet. 7-9), Comptroller General's decisions (R. 39-51), Statutory Construction (R. 51-64, Pet. 11-17). The conclusion is that par. 4, Sec. 15 of the 1942 Act became applicable to retired Reserve officers with the enactment of a law (the 1946 Act) under which they could qualify generally for non-disability retirement (Pet. 5-7), and that its re-enactment by exception from repeal in the Career Compensation Act of 1949 (R. 26-27, 58, 98-100, Pet. 5, 7-10), at a time when it could only apply to Reserve officers with the *additional special* qualification of World War I service, re-affirms the policy of the Congress to eliminate any discrimination between Regulars and Reserves (Pet. 9, 12). It is respectfully submitted that this conclusion squares with the doctrines of *legislative notice* and *in pari materia* and with the Decisions of this Court, and does not involve amendment by implication.

Pay System

3. The second counter-Argument advanced by the Brief in Opposition is "That Congress intended to set up a retirement pay system for reserves entirely distinct from that previously applicable to the regular members of the armed forces * * *" (Br. Op. 13). This contention was first used by the Comptroller General in his opinion B-94125 (R. 48-49). Although some may have so regarded it, actually there is nothing separate and distinct as between Regulars and Reserves in the 1948 Act (R. 100-102). Acts on the same basic principle (equal retirement benefits for both Regular and Reserve officers), but of limited application, were enacted in 1938 (R. 34, Pet. 8) and in 1946

(R. 27, 60, Pet. 8). The 1948 Act was one more step in the non-discrimination policy of the Congress and enlarged the scope of non-disability retirement to include both officers and enlisted personnel of the Armed Forces generally. The only new feature of the 1948 Act is the provision by which Reserves on inactive duty, instead of "marking time" between wars, can earn "points" by participation in training exercises and other professional activities, which are translated into equivalent years of accredited service.

Pay Formula

4. The Brief in Opposition makes a point that the 2½% per year retired pay formula in the 1948 Act is exclusive (Br. Op. 12, 18). On the contrary, all the recent general non-disability retirement Acts contain the same phraseology, or words of similar import (Pet. 14). For example:

> "Officers * * * shall be placed on the retired list * * * with retired pay at the rate of 2½ per centum * * * etc." Computable maximum 75%. (1938 Act.)
>
> "The annual pay of a retired member * * * shall be 3 per centum * * * etc." Computable maximum 75%. (1942 Act.) (Note: This Act specifies varying percentages from 2½ to 4.)
>
> "Officers retired pursuant to the foregoing sections of this Act shall receive retired pay at the rate of 2½ per centum of his active duty pay * * * etc." Computable maximum 75%. (1946 Act.)
>
> "Any person granted retired pay * * * shall receive such pay at an annual rate equal to 2½ per centum * * * etc." Computable maximum 75%. (1948 Act.)
>
> "* * * shall be entitled to receive retired pay * * * computed by one of the following methods: (a) * * *, or (b) * * * 2½ per centum * * * etc." Computable maximum 75%. (1949 Act.)

5. It is beyond dispute, therefore, that the 2½% per year formula, with 75% computable maximum, has been the standard rate of retired pay for at least 15 years and is not unique or exclusive with the 1948 Act. These formulae are used to calculate the retired pay of those whose *general* qualifications satisfy the requirements of the several Acts.

Seventy-five Per Cent Retired Pay

6. The Brief in Opposition confuses (a) the *computable* maximum 75% retired pay (30 years @ 2½%), which is the limit in all recent general retirement Acts, and (b) the *fixed* 75% retired pay for World War I service under par. 4, Sec. 15 of the 1942 Act (Br. Op. 6-7).

7. It assumes that it is more difficult to qualify for retirement under the 1946 Act than under the 1948 Act, and then says—

> "Significantly, Sec. 7, 34 U.S.C. 410c (1946 Act), establishes as the maximum pay allowable those reserves who can meet this much more stringent requirement *the same 75 percent* of active duty pay which petitioner claims under the less exacting requirements of" (the 1948 Act). (Br. Op. 7.) (Parentheses and italics supplied.)

This statement is misleading. Actually under both the 1946 and the 1948 Acts the retired pay for one possessing *only the general qualifications* for retirement is computed by the same formula—2½% per year with the *computable* maximum of 75% for 30 or more years service. The Petitioner does not claim the 75% *computable* maximum to which the Brief in Opposition refers, but the *fixed* 75% allowed under the 1942 Act to those who have the *special* qualification of World War I service.

8. The Court of Claims in its decision, after concluding that World War I Reserve officers who retire under the 1948 Act are not entitled to the fixed 75% retired pay allowed by the 1942 Act, found it

> "unnecessary to decide whether retirement under the provisions of Title III of the Army and Air Force Vitalization and Retirement Act of 1948 requires that the retired pay received be computed in accord with that statute and not under any other." (R. 116.)

That is to say, the Court of Claims did not decide whether the 2½% per year formula in the 1948 Act is exclusive both as to Regulars and Reserves. But, the Brief in Opposition goes beyond the Court of Claims and makes this decision by saying

> "It seems clear, however, that one whose only qualifications for retired pay are derived from Title III of that Act may draw only the retired pay provided for by that Act, and that the result reached by the Court of Claims may equally well be sustained on this alternative ground." (Br. Op. 12.)

The Brief in Opposition fails to distinguish between (a) *general* qualifications for retirement, and (b) *special* qualifications for increased retired pay. The above-quoted statement is correct with respect to one who possesses *only the general qualifications* for retirement. Naturally, his retired pay would be computed by the 2½% per year formula stated in the 1948 Act. By the same token, the statement is also correct as to a Regular officer who possesses *only the general qualifications* for retirement under the 1938 Act, the 1940 Act, or the 1948 Act. His retired pay would, per force, be computed by the 2½% per year formula in those Acts. But, a retired Regular or Reserve officer with World War I service has dual qualifications: (1) *general* qualifications to satisfy the primary requirements for retirement under the Act applicable to him, and (2) the *additional special* qualification of World War I service to satisfy the requirement of the 1942 Act; the latter, as the Comptroller General indicated (R. 59-60), being complementary to the general retirement laws.

Miscellaneous

9. The Brief in Opposition comments on two points * * *

(a) Cost (Br. Op. 11, 14), and

(b) Comparative retirements qualifications (Br. Op. 7),

which are legislative and administrative subjects, not legal. However, since they are in the record, they must need be disposed of.

(a) *Cost:* The Brief in Opposition, by proportional comparison (Br. Op. 5, 11, 14), attempts to create the impression that the Petitioner's claim would "impose a great financial burden on the public treasury" (Br. Op. 11). The answer to that statement is—first, legal rights are not measured in dollars and cents; second, the cost is not excessive and would be of relatively short duration. Because of the present age of World War I Reserve officers, in a few years par. 4, Sec. 15 of the 1942 Act will become obsolete (R. 64-65).

(b) *Comparative Retirement Qualifications:* (i) The primary qualifications which one must have to earn nondisability retirement is a legislative matter for the Congress to decide. The Brief in Opposition missed the point entirely in its comparison of the "more stringent (?) requirement" of P.L. 305 (the 1946 Act) with those of P.L. 810 (the 1948 Act) (Br. Op. 6-7). P.L. 305 requires "more than twenty years of active service", P.L. 810 requires "twenty or more years of such satisfactory service" (R. 27-28). Both Regular and Reserve officers can retire under both Acts, but in spite of the alleged "more stringent requirement", Reserve officers with World War I service who retire under P.L. 305 (the 1946 Act) are also denied the fixed 75% retired pay provided by par. 4, Sec. 15 of the 1942 Act.

(ii) "Satisfactory service", as defined in P.L. 810 (1948 Act), consists of (1) active duty and (2) participa-

tion in prescribed training, drills, etc., during inactive duty. On one extreme, it is possible for a Reserve to qualify for retirement under P.L. 810 by having served twenty years on active duty; and, on the other extreme, it is possible for a Reserve to qualify for retirement under P.L. 810 by having earned a computable twenty years of satisfactory service by participating in prescribed training, drills, etc. Between these two extremes, innumerable combinations of both active and inactive duty can be used to complete "twenty or more years of such satisfactory service".

(iii) To say that one general retirement law has more stringent requirements than another, especially when the reward is the same, is to charge the Congress with passing discriminatory legislation. As for retired pay, it makes no difference whether a Reserve officer qualifies generally under P.L. 305 or P.L. 810, it is figured by the same 2½% per year formula in either case. In the matter of qualifications, one general retirement law balances as well as can be expected with another law on the same subject. For example: P.L. 305 calls for twenty years of active duty and allows service school time to be counted in the total. P.L. 810 calls for twenty years of satisfactory service (active and inactive duty) but does not allow credit for service school time. Speaking of the demands on one's time to participate in inactive duty training, Colonel Maas said:

> "Those who voluntarily take time out of their family life, who deprive themselves of a part of their economic and social life to prepare themselves, year after year, in order not only to be available, but to be capable of defending this Nation, make an inordinate sacrifice." (R. 107-108.)

Conclusion

10. It is submitted that the Brief in Opposition does not successfully controvert the Petition on any of the following points:

(a) The importance of the case.

(b) The applicability of par. 4, Sec. 15 of the Pay Readjustment Act of 1942 to retired Reserve officers with World War I service.

(c) The lack of jurisdiction in the United States Court of Claims as to the second proposition in the Berry case.

(d) The applicable rules of Statutory Construction (legislative notice and in pari materia).

(e) The applicable decisions of the Supreme Court of the United States.

Respectfully,

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